

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NOEL HOLLAND,

No. C 04-1238 CW

Plaintiff,

ORDER GRANTING
DEFENDANT'S MOTION
TO SET ASIDE
DEFAULT, GRANTING
PLAINTIFF'S MOTION
TO CONFIRM THE
ARBITRATION AWARD
AND DENYING
PLAINTIFF'S MOTIONS
FOR JUDGMENT ON THE
PLEADINGS AND TO
DENY DEFENDANT'S
RIGHT TO EXPERT
WITNESSES

v.

WESTPORT INSURANCE CORPORATION,
CLAIMS MANAGEMENT SERVICES, INC., and
DOES 1-4,

Defendants.

Defendant Claims Management Services, Inc. (CMS) moves pursuant to Federal Rule of Civil Procedure 55(c) to set aside the default entered by the clerk on January 5, 2007, at the request of Plaintiff Noel Holland. Holland opposes the motion and also moves (1) for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) and (2) for an order that Defendant Westport Insurance Company (Westport) has waived its right to have an expert

1 witness review Holland's medical records.¹ Defendants CMS and
2 Westport oppose Holland's motions. The matters were taken under
3 submission on the papers. Having reviewed all of the papers
4 submitted by the parties, the Court grants Defendant CMS's motion
5 to set aside the default and denies Holland's motions for judgment
6 on the pleadings and to preclude Defendants from using an expert
7 witness.

8 BACKGROUND

9 This case arises out of a February 20, 2003 auto collision in
10 which Holland was driving a van insured by Westport under a policy
11 obtained by Daytop Village, Inc. In October, 2003, Holland settled
12 a claim against Allstate, the insurer of the third party driver who
13 caused the accident, for the policy limit of \$25,000. Five
14 thousand dollars of that settlement was paid by Allstate to
15 Westport on a subrogation claim. Holland alleges that Westport
16 owes him additional compensation pursuant to the provision of the
17 insurance policy in which Westport promises to "pay all sums the
18 'insured' is legally entitled to recover as compensatory damages
19 from the owner or driver of an 'uninsured motor vehicle.'" First
20 Amended Complaint (FAC) ¶ 12. This provision is mandated by
21 California Insurance Code § 11580.2.

22 Holland first informed Westport of the accident in February,
23 2003. On October 28, 2003, after receiving the \$25,000 settlement

24
25 ¹Holland also moves the Court to confirm the arbitration award
26 entered on July 27, 2006 and to enter judgment. Defendants have
27 filed a statement of non-opposition and proof that they have
already satisfied the arbitrator's award. The Court grants
Holland's motion to confirm the arbitration award.

from Allstate, his attorney sent a letter to CMS, Westport's third party administrator, stating that he was filing an under-insured motorist claim for \$1 million, the policy limit. Addy Declaration, Exhibit 17. CMS responded, requesting that Holland's attorney have Allstate contact it regarding subrogation so that it could initiate the under-insured motorist claim. Addy Declaration, Exhibit 18.

7 On November 10, 2003, after receiving information from
8 Allstate, CMS wrote again to Holland's attorney, indicating its
9 belief that Westport was entitled to \$5,000 in subrogation² and
10 requesting "an open ended extension" to review the \$1 million
11 demand. Addy Declaration, Exhibit 19. Holland's attorney
12 responded by stating that Holland would bring suit for bad faith
13 against Westport unless it accepted his claim before November 24,
14 2003.³ Addy Declaration, Exhibit 20.

15 On November 24, 2003, CMS responded, stating that it sought
16 the extension because the parties still had not resolved whether
17 Westport was entitled to subrogation. Addy Declaration, Exhibit
18 21. Further, CMS pointed out that the medical receipts submitted
19 by Holland totaled \$12,030.21. *Id.* Because Holland had collected
20 \$25,000 from Allstate and the \$5,000 physical therapy payment from
21 Westport, CMS denied Holland's claim. *Id.* Although it denied the
22 demand for \$1 million, there is evidence in the record that CMS

24 ²Westport paid \$5,000 directly to the physical therapist
25 treating Holland.

26 ³This date was based on Holland's attorney's assertion that
27 the under-insured motorist claim had been received by CMS on
October 14, 2003 and that California law requires a final decision
on a claim within forty days.

1 continued to investigate the claim.

2 On the same date that CMS denied the demand for \$1 million,
3 Westport offered to waive its right to subrogation and to give
4 Holland an additional \$5,000 to settle the claim. Addy
5 Declaration, Exhibit 22. The letter noted that Holland had been in
6 another car accident on March 14, 2003, and that the only medical
7 care he received after the accident at issue and before the second
8 accident was the initial trip to the emergency room. Id.
9 Defendants state that Holland has not responded to the letter.

10 Westport continued to investigate Holland's claim, arranging
11 for independent medical evaluations with an orthopedist, an
12 internist and a psychiatrist. Addy Declaration, Exhibit 23.
13 Defendants state that Holland attended his appointment with the
14 orthopedist, but failed to keep the other two appointments.
15 Holland contends that this is false and that Defendants rescheduled
16 the other two appointments without informing him of the change. He
17 does not produce any evidence to support this contention.

18 Holland filed this action on February 20, 2004, alleging that
19 Defendants failed properly to investigate his claim, to communicate
20 with him about the status of his claim, or to pay the claim. The
21 FAC asserts four causes of action: (1) breach of contract against
22 Westport; (2) breach of the covenant of good faith and fair dealing
23 against Westport and CMS; (3) intentional infliction of emotional
24 distress against Westport and CMS; and (4) negligent infliction of
25 emotional distress against Westport and CMS.

26 CMS and Westport moved to dismiss the FAC. On June 21, 2004,
27 the Court dismissed Holland's second cause of action against CMS,

1 but otherwise denied Defendants' motion. The Court also found that
2 the parties were required first to arbitrate the benefit amount
3 dispute pursuant to Insurance Code § 11580.2(f). Rather than
4 dismiss the case, the Court exercised its discretion to stay
5 Holland's other claims while Holland pursued arbitration. Holland
6 attempted to appeal the Court's order. After the appeal was
7 resolved, the matter proceeded to arbitration.

8 On July 27, 2006, the arbitrator awarded \$39,100.71 to Holland
9 but found that Allstate had already paid him \$20,000. Therefore,
10 the arbitrator found Westport liable for \$19,100.71.

11 On August 9, 2006, Holland filed notice that he intended to
12 proceed with the remaining bad faith and intentional and negligent
13 infliction of emotional distress claims in the FAC. On October 20,
14 2006, counsel for Defendants filed an answer on behalf of Westport.
15 On January 3, 2007, Holland filed his motions presently before the
16 Court and on January 4, he filed a motion for entry of default
17 judgment. On January 5, the clerk entered default judgment against
18 CMS and CMS filed the present motion to set aside the default.

19 DISCUSSION

20 I. Motion to Set Aside Default Judgment

21 The Court may set aside an entry of default "for good cause
22 shown." Fed. R. Civ. P. 55(c). The standards for good cause to
23 set aside an entry of default are the same as the standards to set
24 aside a default judgment pursuant to Rule 60, Chrysler Credit Corp.
25 v. Macino, 710 F.2d 363, 367 (7th Cir. 1983), although they should
26 be applied more leniently in the Rule 55 context. Meehan v. Snow,
27 652 F.2d 274, 276 (2d Cir. 1981). Rule 60 permits the Court to set
28

1 aside a default judgment for reasons of "mistake, inadvertence,
2 surprise, or excusable neglect," among other reasons not relevant
3 here. F.R.C.P. 60(b)(1). The Ninth Circuit has directed district
4 courts to consider several factors when determining whether to
5 exercise their discretion to set aside a default judgment:

- 6 (1) the possibility of prejudice to the plaintiff,
7 (2) the merits of plaintiff's substantive claim,
8 (3) the sufficiency of the complaint,
9 (4) the sum of money at stake in the action,
10 (5) the possibility of a dispute concerning material facts,
11 (6) whether the default was due to excusable neglect,
12 (7) the strong policy underlying the Federal Rules of Civil
13 Procedure favoring decisions on the merits.

14 Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Default
15 judgments are generally disfavored. Id. at 1472.

16 Defendant CMS moves to set aside the default judgment entered
17 against it, arguing that it failed to answer the complaint against
18 it because its counsel mistakenly believed that all remaining
19 claims had been dismissed against it. However, the Court only
20 dismissed the second cause of action for breach of the covenant of
21 good faith and fair dealing against CMS. Holland argues that the
22 Court should deny CMS's motion to set aside the default judgment
23 for three reasons.

24 Holland first argues that CMS's failure to file an answer
25 "constitutes culpable conduct" because CMS clearly had notice of
26 the action against it and the decision not to file an answer was a
27 willful and strategic act. This argument is primarily based on
28 Holland's contention that Defendants' counsel's explanation for the
29 failure to file was not adequate. However, the Court finds that
30 counsel's explanation of his mistaken belief that the claims
31 at issue had been dismissed is reasonable.

1 against CMS had been dismissed is sufficient to meet the lenient
2 standard of "good cause" needed to establish that a disfavored
3 default judgment should be set aside.

4 Holland next argues that CMS lacks a meritorious defense to
5 the claims against it, alleging that Defendants have admitted that
6 they denied his claim without investigation in violation of
7 California state law. However, Defendants admit only that they
8 "denied the demand of the policy limits of one million dollars
9 based on the information provided by plaintiff as an amount [that]
10 exceeded the reasonable value of the case based on their experience
11 and training." Allen Declaration ¶ 19. Further, Defendants
12 maintain and provide evidence that they continued to investigate
13 Holland's claim after denying the \$1 million payment.

14 Finally, Holland asserts that he will be prejudiced if CMS is
15 allowed to file its answer now. However, Holland primarily
16 reiterates his claim that CMS acted culpably in deciding not to
17 answer the complaint. As stated above, the Court accepts CMS's
18 counsel's explanation that he mistakenly believed that all claims
19 had been dismissed against CMS and therefore it need not answer the
20 complaint. Further, Holland's only suggestion of prejudice is that
21 allowing CMS to file an answer will delay the case and increase the
22 cost of litigation. It is not clear how setting aside the default
23 will cause either a delay in litigation or any increase in cost for
24 Holland above and beyond the normal cost of litigation. The claims
25 against CMS are the same as claims against Westport, and Holland
26 will have to make similar showings against them both. Further, the
27 Ninth Circuit has held, "To be prejudicial, the setting aside of a

1 judgment must result in greater harm than simply delaying
2 resolution of the case." TCI Group Life Ins. Plan v. Knoebber, 244
3 F.3d 691, 701 (9th Cir. 2001).

4 The Court finds that CMS has demonstrated that default was
5 entered against it because of its counsel's excusable mistake.
6 Further, Holland has not demonstrated that there is any reason not
7 to grant the motion to set aside the default. CMS appears to have
8 valid defenses to Holland's claims, and his argument of prejudice
9 is unavailing. The Court grants CMS's motion to set aside the
10 default judgment.

11 II. Judgment on the Pleadings

12 Federal Rule of Civil Procedure 12(c) provides, "After the
13 pleadings are closed but within such time as not to delay the
14 trial, any party may move for judgment on the pleadings." Judgment
15 on the pleadings is proper when the moving party clearly
16 establishes on the face of the pleadings that no material issue of
17 fact remains to be resolved and that it is entitled to judgment as
18 a matter of law. Hal Roach Studios, Inc. v. Richard Feiner & Co.,
19 Inc., 896 F.2d 1542, 1550 (9th Cir. 1990). In considering a motion
20 for judgment on the pleadings, the Court must accept the
21 allegations of the non-moving party as true; the allegations of the
22 moving party which have been denied are assumed to be false. Id.

23 Holland moves for judgment on the pleadings, alleging that
24 Defendants have admitted that CMS denied his claim for benefits
25 without investigation. However, as discussed above Holland
26 misrepresents Defendants' statements. Defendants did not admit
27 that they denied Holland's claim without investigation. This is a
28

1 material question of fact that precludes the grant of judgment on
2 the pleadings. See Hal Roach Studios, 896 F.2d 1542, 1550 (9th
3 Cir. 1990).

4 III. Waiver of Right to Expert Witnesses

5 Finally, Holland claims that Defendants have waived their
6 right to have medical experts review his medical files to support
7 their positions in this case based on his assertion that Defendants
8 failed to investigate his claim before denying it. Again, this
9 argument is based on Holland's unsupported assertion that
10 Defendants denied his claim without investigation. Further,
11 Holland's position is not legally supportable.

12 Holland relies on McLaughlin v. Connecticut General Life
13 Insurance Company, 565 F. Supp. 434, 452 (N.D. Cal. 1983) for his
14 waiver argument. McLaughlin, which interprets California law, only
15 found that an insurance company that denied a claim for a single
16 reason and did no investigation could not raise additional defenses
17 on summary judgment. Even if the holding in McLaughlin could
18 support an argument that Defendants have waived their right to
19 expert witnesses, the strict rule applied in that case has been
20 rejected by both the Ninth Circuit and the California Supreme
21 Court. See Intel Corp. v. Hartford Acc. & Indem. Co., 952 F.2d
22 1551, 1559 (9th Cir. 1991); Waller v. Truck Ins. Exchange, Inc., 11
23 Cal. 4th 1, 33 (1995). The Court denies Holland's motion.

24 CONCLUSION

25 For the foregoing reasons, the Court GRANTS Defendant CMS's
26 motion to set aside the default judgment (Docket No. 100), GRANTS
27 Holland's motion to confirm the arbitration award (Docket No. 107),
28

1 DENIES Holland's motion for judgment on the pleadings (Docket No.
2 92), and DENIES Holland's motion to preclude Defendants from using
3 an expert witness (Docket No. 87).⁴

4 Defendant CMS shall file its answer within five days of this
5 order and shall abide by the case management schedule previously
6 set.

7 IT IS SO ORDERED.

8 3/28/07

9 Dated: _____

Claudia Wilken

CLAUDIA WILKEN
United States District Judge

26 _____
27 ⁴Defendants' objections to the Berenahu declarations are
DENIED as moot. The Court did not consider any improper or
inadmissible evidence.